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No. 03-48

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION FOR BILTMORE FOREST BROADCASTING FM, INC.

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PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were the petitioner here (Biltmore Forest Broadcasting FM, Inc.), the Federal Communications Commission, and intervenors Liberty Productions, L.P., and Orion Communications, Ltd.

Biltmore Forest Broadcasting FM, Inc., is a closely held North Carolina corporation without any subsidiaries or parent companies. No parent or publicly held company owns 10% or more of the corporation's stock.

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ARGUMENT IN REPLY

A. The FCC argues that the issue of the degree of deference due to a rule interpretation by an interested administrative agency was not raised or ruled on below and hence should not be considered by this Court. (FCC Brief at 6-7). This is argument is easily refuted by reference to the text of Biltmore Forest Broadcasting FM, Inc.'s ("Biltmore") appellate brief. The lead argument in that brief squarely addressed at considerable length the facts that the FCC is heavily invested in raising the maximum amount of money

from its license auctions and that this circumstance has consistently shaped its decisions with respect to challenges to the basic qualifications of auction winners. (Petitioner's Court of Appeals Brief at p.16.) On this basis, Biltmore explicitly urged the Court of Appeals to accord no deference to the FCC's decision. *Id.* Biltmore went on to contrast the FCC's scrupulous application of the terms of its auction public notice in *NextWave*[1] (where strict adherence to the auction terms set forth in a public notice would garner it $16.3 billion) with its highly forgiving application of the terms specified for the auction at issue here (where lax application of the auction terms would yield it an additional $1,692,500.) The corruption of the FCC's motives by the desire to maximize the auction take was thereafter woven into the fabric of the auction-related arguments advanced by Biltmore, culminating in a conclusion that again expressly attacked the FCC decision as being financially motivated. Far from being a "rhetorical flourish," Biltmore's argument to the D.C. Circuit that no deference was due was integral to its appeal.

The Court of Appeals plainly understood that, and directly rejected the suggestion that no deference be accorded. On the contrary, the Court ruled that the disposition of the case hinged entirely on the "controlling weight" which must be given to the agency's interpretation of its regulations. (Petitioner's Brief, App. A-9-10.) The Appeals Court did not elaborate on the reasons for its rejection of the deference argument, but it may have simply

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[1] *In the Matter of Requests for Refunds of Downpayments Made in Auction No. 35*, 17 FCC Rcd 6283 (2002).

considered itself bound by the well-settled *Bowles v. Seminole Rock*[2] principle that deference is due to an administrative agency's interpretation of its own regulations. To be sure, Biltmore forcefully argued that the FCC's interpretation of a facially mandatory regulation as merely admonitory was inconsistent with the plain language of the rule and thus not entitled to deference, but that argument was in addition to, not in lieu of, the argument that the FCC's pecuniary interest undermined its entitlement to deference. In any case, there can be no doubt that the issue presented here was explicitly presented to the Court of Appeals and was adversely resolved by that Court.

B. The FCC also urges the Court to deny certiorari on the grounds that the Second Circuit Court of Appeals has addressed the issue presented to the Court here. *In re NextWave Personal Communications, Inc. v. FCC*, 200 F.3d 43, 57-60 (2d Cir. 1999), cert. den., 531 U.S. 1029 (2000). This is hardly a reason for this Court to forego review of the issue. The Second Circuit was simply following the *Bowles*-based principle of deference to administrative agencies which we are asking the Court to revisit. As noted in our Brief in chief, this Court did not in its own review of the *NextWave* situation defer to the FCC's interpretation of its regulatory authority in the bankruptcy context.[3] This obviously suggests, at a minimum, that the deference due an administrative agency should not be absolute, particularly

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[2] *Bowles v. Seminole Rock*, 325 U.S. 410 (1945).

[3] *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

when the agency is dealing with matters outside its core area of expertise.[4] It also suggests that the Second Circuit's posture of extreme deference to an interested agency may not be the current state of the law in this area.

C. The FCC next argues that this Court has historically applied deference principles even when the agency involved is raising money for the Treasury. (FCC Brief at p. 8.) However, the only examples the FCC can muster are regulations interpreted by the IRS. It may be that the IRS, whose entire purpose is to collect funds, is a special case. It makes no bones about serving the public interest – it unabashedly tries to gather the maximum amount of tax revenues, which is why a unique Tax Court was established by Congress to review many IRS decisions. In any case, the FCC duly acknowledges that none of the IRS cases cited actually address the issue raised here. Biltmore and the FCC agree that this is a case of first impression with this Court. The fact that the traditional deference rule has been uncritically applied for many years without examination of its underlying validity in the context of an interested agency is no reason to continue ignoring the issue now.

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[4] The FCC incorrectly suggests that Biltmore's view is that the FCC is only entitled to deference on "technical issues". (FCC Brief at 10-11) The FCC's expertise clearly extends to many telecommunications issues, both technical and non-technical, and Biltmore does not assert otherwise. But the application of the stated terms governing the conduct of an auction is not a telecommunications function at all. It is, rather, a matter of government contracts which falls nowhere within the FCC's peculiar expertise.

D. Finally, the FCC asserts that it did not actually change the auction rules after the auction was over. Examination of the pertinent public notices incontrovertibly demonstrates otherwise. The Public Notice issued by the FCC which established the ground rules for the auction explicitly required potential bidders to supply a key certification. The Notice explicitly stated that the material had to be submitted by a date certain and that, if it was not submitted by that date, the necessary consequence was inability to participate in the auction. See Petitioner's Appendix E-2, E-3, E-6 through E-10. After the auction was over, the FCC ruled that this material did not have to be submitted by the date previously specified but could be submitted after the auction was over, and that bidders who had failed to timely supply the information were nevertheless eligible to participate. (Petitioner's App. B-9-12.) There is simply no intellectually honest way in which this 180-degree reversal of position can be viewed as anything but a material change in a fundamental term of participation in the auction. Real bidders placed or did not place real bids in reliance on the eligibility rules stated before the auction began, and the FCC's reneging on the rules it had established thus caused an innocent bidder to lose.

CONCLUSION

The circumstances of this case happen to represent a particularly egregious case of an interested administrative agency grossly exceeding the bounds of permissible "interpretation." The outcome of the FCC's consideration of the case was so obviously result-driven (*i.e.*, revenue-driven) as to legitimately call into doubt the agency's ability to render an impartial judgment in matters of this kind. At a minimum, however, the rule requiring courts to defer to an

agency under these circumstances is ripe – perhaps beyond ripe – for review by this Court. The Petition should be granted.

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